whether it was due to a combination of inexperienced driving and lack of presence of mind in an emergency.

It is all very well to say there was a "road closed" sign just above the Lake Club and, whatever the defendant says and whatever his witnesses say, I accept that as true but the single road immediately above the Lake Club leads to a cross road from which five or six roads branch off and the notice at the Lake Club did not indicate which of these roads lying ahead was closed. In the circumstances it is reasonably possible that the defendant when he came to the actual cross road was taken by surprise. It is reasonably possible that being so bad a driver as he clearly is he found himself incapable of coping with the emergency with which he was then faced.

I think that was a reasonable possibility in the absence of any very definite direct evidence as to speed and I do think that at the very lowest the Magistrate should have taken it into account as causing a substantial doubt as to the correctness of the inference which he has in fact drawn of careless driving.

In all the circumstances of the case I allow the appeal and quash the conviction. The fine paid by the appellant must be refunded.

Appeal allowed.

TAN MENG SAN v. LIM KIM SWEE

[C.A. (Thomson C.J., Hill and Good JJ.A.) June 5, 1961]

[K.L. — F.M. Civil Appeal No. 6 of 1961]

Contract — Agreement to transfer land on satisfaction of certain debts — No transfer made after satisfaction — Whether contract was unfair — Whether there was unreasonable delay — When condition precedent must be fulfilled.

Specific Relief (Malay States) Ordinance, 1950, ss.21 and 27.

The appellant on August 30, 1958, agreed to the transfer of a certain piece of land to the respondent in consideration of the respondent settling the appellant's debt to C for $16,000 and paying the appellant's solicitor his professional fee of $5,000. The respondent subsequently paid off the appellant's debts to C and arranged with the said solicitor whereby the said solicitor no longer looked upon the appellant for payment of his said professional fee. The appellant despite these arrangements refused to transfer the said land to the respondent. It was contended for the appellant that (1) the contract was unfair, (2) there was no proof of fulfilment of the condition precedent, namely payment to C, (3) there was no proof that the respondent was able and willing to perform his part of the contract, (4) there was undue delay on the part of the respondent, and (5) in view of the principles in *Aberfoyle Plantations Ltd.* v. *Khaw Bian Cheng* (1) payment to C was a condition precedent.

Held: (1) the appellant had received in the fullest measure all that he bargained for and the Court should not exercise the powers under section 21 of the Specific Relief Ordinance, 1950, to vary the findings of the trial judge;

(2) in view of the evidence, the second ground must fail;

(3) the proof of the respondent's willingness to perform his part of the bargain lay in the fact that he paid C;

(4) in all the circumstances of the case the respondent was not guilty of unreasonable delay in seeking his remedy;

(5) as time was not the essence of the contract only the second principle in *Aberfoyle Plantations Ltd.* v. *Khaw Bian Cheng* (1), namely that the condition must be fulfilled within a reasonable time applied in this case.

Cases referred to:—

(1) *Aberfoyle Plantations Ltd.* v. *Khaw Bian Cheng* [1960] M.L.J. 47, P.C.

(2) *Hesse* v. *Briant* 43 E.R. 1375.

(3) *Ardeshire H. Mama* v. *Flora Sassoon* A.I.R. 1928 P.C. 208.

(4) *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai* A.I.R. 1915 P.C. 83.

(5) *Mills* v. *Haywood* 6 Ch. D. 196, 202-3.

COURT OF APPEAL.

A. L. Hills for the appellant.

D. G. Rawson for the respondent.

Cur. Adv. Vult.

Good J.A. (with whom **Thomson C.J.** and **Hill J.A.** concurred): This is an appeal from a judgment of Ong J. in an action in the High Court at Seremban in which the present respondent was granted a decree for specific performance of an agreement for the sale of land.

The facts of the case have been complicated and to some extent confused by the acts of the parties themselves. The question to be decided is simple enough: it is, whether the respondent has by his own act or omission debarred himself from obtaining a decree for specific performance; but before attempting to answer that question it is necessary to examine the history of the transaction in some detail.

The appellant is the executor and trustee of the will of his mother who died in 1935. The testatrix bequeathed the whole of her property to the appellant and one of his brothers, Tan Hai San, as trustees, with directions to them to sell the property and to hold the proceeds in trust, one-third for Tan Hai San, one-third for the appellant and the remaining one-third for the children of another brother. Probate was granted to the appellant in 1936.

The estate included the land comprised in Negri Sembilan Certificate of Title No. 4135 for Lot No. 1791 in the Mukim of Ampangan in the District of Seremban, and it is with this land that the present proceedings are concerned. The appellant is the registered proprietor of the land "as representative".

On 12th November, 1954, the appellant borrowed from one S. J. Coelho the sum of $20,000, repayable on 6th November, 1960. Interest at 15 per cent per annum was to be paid by the appellant on the 12th day of every month throughout the term of the loan, and if the interest fell into arrear for three months the principal and the arrears of interest were to become due and payable immediately. As security for

the loan the appellant deposited with the lender the document of title to the land already mentioned.

By the month of August, 1958 the appellant had made default in payment of interest for more than three months, and Coelho became entitled to call in the loan. There is no evidence that he did so at that stage, but the appellant must have been apprehensive for on 13th August Mr. Kaher Singh, Advocate and Solicitor, wrote on his behalf to Coelho enquiring whether he would be agreeable to a settlement and, if so, upon what terms. At that time the appellant and the respondent had begun negotiations for a transfer of the land to the respondent in consideration of Coelho's claim being settled by the respondent and of such further sum as the respondent might be prepared to pay to the appellant. This part of the transaction is the subject of much conflicting evidence, given by the parties themselves and by Mr. Kaher Singh, which has been considered with such care by the learned trial Judge that it is unnecessary to restate it. The fact is that whatever may be the truth as to the preliminary discussions and negotiations, and whatever sum each of the parties may have supposed that Coelho would be prepared to accept, the appellant on 30th August, 1958 entered into an agreement to transfer the land to the respondent in consideration of his paying $16,000 to Coelho, $5,000 to Mr. Kaher Singh for his professional services, and $700 to the appellant which was paid there and then.

That the appellant had second thoughts and sought to abrogate the agreement on the very next day, on a number of pretexts which must have been present to his mind at the time of signing, has no bearing on the question in issue in view of the subsequent dealings between the parties.

It is not without interest, and it is typical of the appellant's conduct throughout, as will appear later, that at the time he made the agreement with the respondent there was already in existence another agreement, dated 27th April, 1955, between the appellant and one Lim Kim Siong (who will make another appearance later in the narrative), whereby the appellant had granted to Lim Kim Siong prospecting rights and an option on mining rights over the land in question. The appellant received $500 for the prospecting rights.

Notwithstanding his purported abrogation of the agreement the day after it was made, the appellant on 4th November, 1958 gave the respondent a letter of authority entitling him to receive the Rubber Replanting grants payable to the owner of the land. This was tantamount to treating the respondent as the prospective owner and suggests that the appellant had abandoned the position which he took up in his letter of 31st August when he sought to withdraw from his contract.

Some time after the agreement was signed the respondent went into possession of the land, and although there was a conflict of evidence as to the time that he was or has been in possession there was abundant evidence, largely corroborated by documentary evidence, on which the trial judge could have found, if it had been necessary for him to do so, that the respondent was in possession from September 1958 up to the date of the trial. At all events, there is corroborated evidence, which though attacked in cross-examination was not rebutted, that between the date of the agreement and the date of the trial the respondent spent about $45,000 on the development of the land.

The next event in the story is a letter dated 4th December, 1958 from Messrs. Joseph & Son, Advocates and Solicitors to the appellant written on behalf of Coelho demanding repayment within seven days of the whole of the $20,000 together with $8,250 being arrears of interest from 12th March, 1956 to 12th December, 1958. On 10th December, 1958, that is the day before Messrs. Joseph & Son's notice of demand was due to expire, the appellant wrote a letter to the respondent in which he stated that Coelho's lawyer had filed a suit against him for $28,000. This was palpably untrue, because Coelho's suit against the appellant was not in fact commenced until 5th August, 1959, but the appellant explained it by saying that he meant that Coelho was contemplating filing a suit. The appellant complained that the respondent's lawyer Mr. Kaher Singh had not made any attempt at a settlement with Coelho and warned the respondent that the letter of authority in respect of the Replanting Grants would be withdrawn (the expression which he used was "null and void") unless the respondent settled the loan by the 21st December. This letter was handed to Mr. Kaher Singh who replied on the 17th December that the respondent had been negotiating for a settlement of the loan and would defend any proceedings brought against the appellant by Coelho, which presumably meant that he was willing to pay for the defence. Coelho himself wrote to the appellant on 7th January, 1959 giving him a final reminder that legal proceedings would be instituted if the amount of $28,250 was not paid.

The appellant thereupon proceeded to take action on his own account through Messrs. H. W. Tan & Co., Advocates and Solicitors who wrote on 8th January, 1959 to Mr. Kaher Singh's firm enquiring whether the sums of $16,000 and $5,000 had been paid to Coelho by the respondent and they followed this up with a further letter on the 9th January in which they stated that they had been instructed to apply to the Court to set aside the agreement of 30th August, 1958 on the ground that it was null and void or alternatively to sue for breach of contract. It does not appear that Mr. Kaher Singh replied to this letter and on 30th January, 1959 a writ was issued in the name of the appellant against the respondent for a declaration that the agreement

between the parties was null and void or alternatively for an order that it be rescinded on the ground of breach by the respondent and for damages. It may be convenient at this stage to mention that this suit, Civil Suit No. 5 of 1959, was discontinued on 17th October, 1959.

Nothing further appears to have happened after this until 2nd June, 1959 when the appellant entered into an agreement with one Lee Kew for the sale of approximately 75 acres out of the 102 acres contained in Lot No. 1791 for $305 an acre and a deposit of $3,000 was paid by Lee Kew to be held by Mr. Yong Sze Lin, Advocate and Solicitor until the completion of the purchase. Not unnaturally the parties contemplated that certain difficulties might stand in the way of effecting the transfer of the land to Lee Kew and although they fixed 13th July, 1959 as the date for completion of the transfer they made provision for extending the date "until the claim dispute and litigation, if any, in respect of the said land has been concluded or determined." The first of the difficulties anticipated by the parties arose almost immediately, for on 18th June, 1959 the respondent obtained an interim injunction restraining the appellant from executing any transfer, charge, or lease of the land pending the disposal of Civil Suit No. 5 of 1959.

On the 14th July, 1959 the appellant entered into an agreement to sell to one Lim Lian Hoe approximately 26 acres of the land contained in Lot 1791 for $900 an acre and Lim Lian Hoe paid a deposit of $3,000 to the appellant, the receipt of which the appellant acknowledged. The appellant undertook, if the purchase was not completed within six months, to refund the deposit and to pay to the intending purchaser a further sum of $6,000.

On 24th July, 1959 the appellant revoked the letter of authority which he had given to the respondent to enable him to receive the Rubber Replanting grants not only in respect of Lot No. 1791 but also in respect of another Lot No. 1239, which he had transferred to the respondent and a Malay lady on 20th January, 1958 (the transfer was not registered until 25th February, 1960) and with regard to which, so far as the evidence in this case shows, no dispute had arisen between the parties.

On 25th July, 1959 Mr. Yong Sze Lin on behalf of Coelho wrote to the appellant demanding payment of the principal sum of $20,000 within three days and warning the appellant that in default of payment proceedings would be instituted without further notice. The demand was not complied with and the threatened proceedings were instituted on 5th August, 1959 in Civil Suit No. 43 of 1959. They resulted in judgment in default of appearance being given in favour of Coelho for $21,075 on 11th September, 1959. An unexplained feature of that case was that although Coelho's statement of claim included an averment with regard to the arrears of interest, he did not claim the arrears but only sued for the principal and the usual interest at 6 per cent from the date of judgment.

The next move was made by the respondent who on 11th September, 1959 issued a writ against the appellant in Civil Suit No. 51 of 1959 through Mr. Kaher Singh. The cause of action was the revocation by the appellant on 24th July, 1959 of the letter of authority in respect of the Rubber Replanting grants. The respondent claimed $90,000 as damages for loss of income incurred by him in replanting 70 acres of rubber and a catch-crop of 45 acres of bananas on the land. The appellant filed a defence, but the action was subsequently discontinued by the respondent on 29th October, 1959.

On 24th October, 1959 Messrs. Jeff & Co., Advocates and Solicitors, wrote a letter to the appellant on behalf of the respondent stating that the respondent was still willing and able to pay the sum of $21,000 being the agreed purchase price of the land and calling upon the appellant to execute a transfer within seven days failing which proceedings would be taken. It does not appear that the appellant replied to this letter and in the event the respondent filed Civil Suit No. 59 of 1959 against him on 3rd November, 1959 claiming specific performance of the agreement of the 30th August, 1958 or damages in the alternative.

On 8th April, 1960 Mr. P. P. Nair, Advocate and Solicitor wrote to the respondent on behalf of the appellant complaining of the failure of the respondent to fulfil his obligations under the agreement of the 30th August, 1958 and requiring the respondent to vacate the land on the ground that he had been a trespasser thereon since the 21st December, 1958 in consequence of the revocation by the appellant of his letter of authority in respect of the Rubber Replanting grants and threatening proceedings for ejectment and damages if the respondent did not comply with the notice. When that letter was written the respondent had already paid the amount found by the Court to be due by the appellant to Coelho and the appellant was aware that it had been paid. In execution of the decree for $21,075 which was given in his favour on 11th September, 1959 in Civil Suit No. 43 of 1959, Coelho had obtained on 26th September, 1959 an order for the sale of the land by public auction and the sale had been announced by public notice to take place on 4th January, 1960; but the respondent paid $21,000 into Court on 16th December, 1959 and the balance of $75 on 19th February, 1960, thereby averting the sale. The decree was for $20,586 in favour of Coelho and the balance was for expenses in connection with the attachment and intended sale. The appellant admitted in evidence that he had become aware on 22nd December, 1959 that the respondent had paid $21,000 into Court in Coelho's action. It is clear that by this time he did not want the respondent to settle his debt to Coelho (in view of the agreements into which he had

entered with Lee Kew and Lim Lian Hoe it is easy to understand how great an embarrassment it must have been to him) and so on 26th December, 1959 he wrote to Mr. Yong Sze Lin, with a copy to the Assistant Registrar, Supreme Court, objecting to Coelho's decree being settled by anyone except himself and requesting that the auction sale should proceed as advertised.

Civil Suit No. 59 of 1959 came on for hearing before Ismail Khan J. on 23rd March, 1960 and was concluded on 10th May, 1960 when judgment was given in favour of the present appellant (the defendant in that case) on the ground that the present respondent (plaintiff) had not discharged his obligation to settle Coelho's claim before filing his action for specific performance and that he knew that the appellant could not execute a transfer until Coelho was paid off. The present respondent appealed against that judgment in F.M. Civil Appeal No. 27 of 1960 and the appeal was dismissed by this Court on 17th June, 1960. The judgment is reported in [1960] M.L.J. at page 262.

In effect, therefore, the present proceedings, which were commenced by a writ of summons dated 30th June, 1960, are a renewed attempt on the part of the present respondent to obtain specific performance of the agreement of 30th August, 1958, with ancillary or alternative reliefs.

The relevant facts, when laid bare by stripping the case of the complications introduced into it by the earlier proceedings between the parties and the dealings between the appellant and various other parties, are simple and clear. They are:

(a) that the appellant on 30th August, 1958 agreed to transfer the land to the respondent in consideration of the respondent's settling the appellant's debt to Coelho for $16,000 and paying Mr. Kaher Singh's fee of $5,000;

(b) that the respondent before filing the action had paid Coelho's decree in full;

(c) that the respondent has come to an arrangement with Mr. Kaher Singh whereby Mr. Kaher Singh no longer looks to the appellant for the payment of his fee (this was admitted by Mr. Kaher Singh in his evidence in chief) and

(d) that the appellant has refused and still refuses to transfer the land to the respondent.

Mr. Hills for the appellant has made the task of this Court easier by reducing the grounds of appeal to five main points, and consequently I do not think it necessary to deal *seriatim* and in detail with the itemised grounds of appeal contained in the appellant's memorandum. Mr. Hills' grounds are:

(1) Unfairness of the contract.

(2) No proof of fulfilment of the condition precedent (payment to Coelho).

(3) No proof that respondent was able and willing at all times to perform his part of the contract (he even went so far as to elect to rescind).

(4) Undue delay on the part of the respondent.

(5) The "Aberfoyle" principle — payment to Coelho was a condition precedent (this is a reference to the opinion of the Judicial Committee of the Privy Council in *Aberfoyle Plantations Ltd.* v. *Khaw Bian Cheng* (1)).

Before dealing with these points it will be convenient to set out the relevant sections of the Specific Relief Ordinance, 1950, which are as follows:

"21. The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of Appeal.

The following are cases in which the Court may properly exercise a discretion not to decree specific performance:

I. Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part.

II. Where the performance of a contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.

The following is a case in which the Court may properly exercise a discretion to decree specific performance:

III. Where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

... ...

27. Specific performance of a contract cannot be enforced against a party thereto in any of the following cases —

(a) if the consideration to be received by him is so grossly inadequate, with reference to the state of things existing at the date of the contract, as to be either by itself or coupled with other circumstances evidence of fraud or of undue advantage taken by the plaintiff;

(b) if his assent was obtained by the misrepresentation (whether wilful or innocent), concealment, circumvention, or unfair practices, of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled;

(c) if his assent was given under the influence of a mistake of fact, misapprehension, or surprise:

Provided that, when the contract provides for compensation in case of mistake, compensation may be made for a mistake within the scope of such provision, and the contract specifically enforced in other respects if proper to be so enforced."

The appellant by his first submission invites this Court, in exercise of its powers under section 21, to correct the discretion of the trial judge, and in doing so relies mainly on paragraph (a) of section 27 but, as I understand the argument, partly on paragraphs (b) and (c).

Now it is perfectly true that the appellant was able, in June 1959, to find a purchaser willing to buy three-quarters of the land for $305 an acre and in July 1959 to find another purchaser willing to pay $900 an acre for the remaining quarter: in other words, he could have sold the whole of the lot at that time in two parcels for a total of $46,898.

It is also true that in August, 1958 the appellant agreed to sell the whole of the land to the respondent for $21,700 which works out at about $212 an acre. But if it is suggested that there was anything unconscionable or unfair in the respondent's conduct the answer is that by the middle of 1959 when the appellant entered into the agreements with Lee Kew and Lim Lian

Hoe the respondent had spent nearly $30,000 on improvements and this alone would suggest that if $47,000 or thereabouts was a fair price in June–July 1959 then $21,700 was a fair price in August 1958. In addition, it must be borne in mind that the appellant himself described the 75 acres as rubber land and the 26 acres as mining land; and it is a matter of common knowledge that a miner will enjoy a quicker return on his money than a rubber planter who replants his land with young rubber that takes 7 years to come into production. Therefore the price that a willing buyer would have been ready to pay for the 26 acres of mining land, assuming that minerals had been found, would have been disproportionately high.

There seems to be some suggestion on the part of the appellant that he was misled by the respondent and Mr. Kaher Singh for in this context his counsel referred to the case of *Hesse* v. *Briant* [2]. That was a case in which two parties to negotiations for the sale of certain properties were clients of the same solicitor and on the evidence of the circumstances surrounding the transaction Lord Cranworth L.C., reversing the trial judge on appeal, was of the opinion that there had not been such perfect good faith and openness of dealing as is necessary when a solicitor is acting for both parties to a transaction. But in the case before us in what way can it be said that the respondent obtained any unfair advantage over the appellant since it is obvious that his overwhelming concern at that time was to liquidate his debt to Coelho? It was immaterial to the appellant whether Coelho would accept $16,000 or would insist on payment in full so long as Coelho was in fact bought off by the respondent. As the learned trial judge has aptly observed the appellant has received in the fullest measure all that he bargained for. This ground of appeal must therefore fail.

The next ground of appeal is that there was no proof of fulfilment by the respondent of the condition precedent, namely the payment to Coelho. I cannot see how this ground can be seriously urged in view of the fact that the respondent testified that he paid into Court the amount found to be due to Coelho and produced Court receipts therefor and the appellant admitted that he became aware on the 22nd December, 1959 that payment had been made. It is true that he objected to Coelho's acceptance of the payment from the respondent but we are here considering the question whether the fact of payment was proved, and of course it was. Accordingly, this ground of appeal also fails.

The third ground of appeal is that there was no proof that the respondent was able and willing at all times to perform his part of the contract and that he had moreover debarred himself from claiming specific performance by electing to treat the contract as rescinded. This is a reference to Civil Suit No. 51 of 1959 in which the respondent claimed damages for the withdrawal by the appellant of the letter of authority entitling him to receive the Rubber Replanting grants. The learned trial judge has dealt with this submission, which was also argued before him, by treating clause 3 as a severable part of the contract and by pointing out that the respondent's action rested on a breach of that clause only. He also drew attention to the fact that the action was discontinued under Order 26 rule 1 which provides that such discontinuance is not a defence to any subsequent action.

There is a wide distinction between the present case and the case of *Ardeshire H. Mama* v. *Flora Sassoon* [3] which was cited by Mr. Hills. In that case the suit was in its inception an action for specific performance of a contract for the sale of land with claims for damages in addition or in the alternative. The claim for specific performance was later abandoned by the plaintiff who at the trial claimed damages for breach of contract. In the Judicial Committee their Lordships (*per* Lord Blanesburgh) discussed at some length the history of the equitable relief of specific performance, and considered the effect of section 19 of the Indian Specific Relief Act (section 18 of our Ordinance) in the light of decisions on section 2 of Lord Cairns' Act. The conclusion at which their Lordships arrived was that where a claim for specific performance of a contract is joined with a claim for damages for breach of the contract and the claim for specific performance is abandoned, there is no power in the Court to award damages without an "apt and sufficient amendment of the plaint." The position in the present case is, however, quite different, for here the respondent has never expressly abandoned his claim for specific performance and his election to sue on a severable part of the contract, as he did in Civil Suit No. 51 of 1959, does not in the circumstances amount to an implied abandonment of that claim.

The question of the respondent's willingness to perform his obligation under the contract is connected with the next ground of appeal which alleges undue delay in performance on his part and the two grounds may be conveniently dealt with together. In this connection it will be convenient also to consider Mr. Hills' fifth ground of appeal which introduces the principles enunciated by Lord Jenkins in *Aberfoyle Plantations Ltd.* v. *Khaw Bian Cheng* [1]. These principles are:

(i) Where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by that date;

(ii) Where a conditional contract of sale fixes no date for completion of sale, then the condition must be fulfilled within a reasonable time;

(iii) Where a conditional contract of sale fixes (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles.

As the learned trial judge rightly pointed out, time never was of the essence of this contract and consequently only the second of the *Aberfoyle* principles is applicable. The question to be determined is whether the payment of the amount due to Coelho on 16th December, 1959 was a fulfilment by the respondent of the condition precedent within a reasonable time. In dealing with this question Mr. Hills cited the case of *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai* [4] in which it was held that equity will look at the substance rather than the letter of the agreement to ascertain whether time is of the essence, but even where there is no stipulation as to time will not tolerate undue delay. It was mainly with reference to this question that I thought it necessary to begin this judgment with a history of the whole transaction and its surrounding circumstances set out in some detail, for if we consider the story as a whole it becomes easier to understand why the respondent did not settle the debt to Coelho until more than sixteen months after he had agreed to settle it. First, there was the *volte-face* on the appellant's part the very next day after he had signed the agreement. Next there was the appellant's own delay of more than two months before providing the respondent with the letter of authority to receive the replanting grants. Five weeks later we find the appellant writing to the respondent to give him the unwelcome news that Coelho is suing for $28,000, an increase of $6,300 over and above the amount which the respondent had undertaken to pay. A month later the respondent's solicitor received a notice from the appellant's solicitors to say that they had been instructed to institute a suit to have the agreement declared null and void and three weeks later that suit was commenced. Meanwhile, the appellant had entered into an agreement on 2nd June, 1959 to sell part of the land to Lee Kew and the respondent was obliged to take immediate steps to protect his interest by obtaining an injunction against the appellant to restrain him from disposing of the land. On the 24th July, 1959 the appellant revoked the letter of authority entitling the respondent to the replanting grants, thereby depriving the respondent of a benefit on which he had reason to believe he was entitled to rely by virtue of clauses 3 and 4 of the agreement. On 5th August, 1959 Coelho commenced a suit against the appellant which was decided on 11th September, 1959 but in which an order was made for the sale of the property by public auction on 4th January, 1960. The respondent was immediately in a position to avert the sale by payment of the decretal amount, but Civil Suit No. 5 of 1959 was still pending and he could not rely with confidence on enjoying the benefit of his agreement with the appellant until that was disposed of.

From the respondent's point of view the whole course of the transaction consisted of a series of set-backs and disappointments, directly attributable to the conduct of the appellant, which must have caused him grave anxiety as to the ultimate outcome of his bargain on the faith of which he had already spent so much in developing the land. The proof of his continued willingness to perform his part of the bargain lies in the fact that he did pay Coelho after he became aware that the amount due was not $28,000, as he had been told by the appellant, but $21,075, and after Civil Suit No. 5 of 1959, in which his prospects were in jeopardy until 17th October, 1959, had been discontinued. I say "after he became aware", and not "as soon as he became aware", because there was an interval of two months between the discontinuance of Civil Suit No. 5 of 1959 and the satisfaction of Coelho's decree. In all the circumstances I do not consider it unreasonable that the respondent should have deferred taking action until two months after the last of the obstacles which the appellant had placed in his way had been removed, and I would accordingly hold that he has not been guilty of unreasonable delay in seeking his remedy.

On the view that I have taken on the question of delay, it is unnecessary to consider the application of the principle which Mr. Rawson submitted could be applied to this case for the benefit of his client the respondent: namely, that possession by the purchaser under the contract of sale has the effect of obviating the consequences of his delay in performing his part of the contract. In support of that proposition Mr. Rawson cited the case of *Mills* v. *Haywood* [5] in which the principle is discussed by Cotton L.J. In the present case there was no finding by the learned trial judge as to the fact of possession by the respondent although as I have already stated there was abundant evidence of such possession, and in any event the point does not fall to be decided in these proceedings.

I do not think that I need concern myself with the effect of the two caveats which are referred to by the learned trial judge. One of these was presented in 1956 by the appellant's brother, co-trustee and co-beneficiary Tan Hai San and the other in 1958 by Lim Kim Siong, the man to whom the appellant had sold the prospecting rights over the land. The learned trial judge was informed from the Bar that Lim Kim Siong was prepared to withdraw his caveat and that action had been taken under the Land Code to have Tan Hai San's caveat removed. The learned trial judge made a declaratory order

that the agreement of 30th August, 1958 ought to be specifically performed, leaving such further and consequential directions to follow as might be necessary.

For the reasons which I have stated I am of the opinion that this appeal should be dismissed with costs and I would order accordingly.

Appeal dismissed.

Solicitors: *Donaldson & Burkinshaw; Shearn Delamore & Co.*

MOHAMED HUSSAIN v. LEONG KEE HOOI & ORS.

[O.C.J. (Rigby J.) June 23, 1961]

[Penang — Civil Suit No. 184 of 1960]

Land Laws — Lease for two years with option to renew — Lessors terminating lease at end of original two years — Acceptance of rent after termination of original period — Subsequent sale by lessors "subject to a lease" — Declaration that plaintiff has exercised option and that lease is still in force — Injunction for interference with peaceful possession.

The plaintiff and his partner by an agreement dated June 27, 1958, agreed to take a lease from the 1st and 2nd defendants of a cinema and other associated equipment for 2 years from July 1, 1958, at a monthly rental of $325 with the option to renew. In December 1959 the plaintiff's partner retired and in May 1960 the plaintiff gave verbal notice to the defendants of his intention to exercise his option to renew the lease. The lease contained a clause providing that at the end of 2 years the lessees if they think fit could carry on for a further one or two years. The plaintiff further approached the 1st and 2nd defendants for the renewal of the said lease whereupon the defendants (the 1st and the 2nd) demanded that the rent be increased to $400 as a condition precedent to the renewal to which the plaintiffs did not agree. On the date of expiry of the said lease, i.e. June 30, 1960, the 1st and 2nd defendants informed the plaintiff by a notice sent through their solicitors that the lease had not been renewed. The 1st and 2nd defendants, however, accepted the rent for July 1960. The defendants subsequently completed the sale of the business to the 3rd and 4th defendants "subject to a lease". In this action the plaintiff claimed (1) a declaration that the lease of June 27, 1958 was valid and in full force till June 30, 1962; (2) an injunction restraining the defendants, their servants and agents from interfering with the plaintiff's peaceful possession of the said cinema; (3) an order for the return of certain specified parts of the cinematographic apparatus wrongfully removed by the 1st and 2nd defendants; (4) damages and other further relief.

It was argued for the defendants (a) the lease was void because no memorandum of lease had been executed and registered in accordance with section 92 of the Kedah Land Enactment; (b) the cinema stood on State land, the subject of a temporary occupation licence for one year subject to renewal and it was not transferable; (c) the option for renewal was void for uncertainty.

Held: (1) as the land was State land subject to a temporary occupation licence valid for one year and not transferable to grant a declaration as requested would be tantamount to validating a document which was expressly contrary to law;

(2) the plaintiff had a prior right to possession as against the 3rd and 4th defendants and as such he was entitled to the injunction asked for;

(3) the plaintiff was entitled to an order against all the defendants for the return of the cinematograph equipment wrongfully removed from the cinema;

(4) the plaintiff was entitled to damages from all four defendants as specified in the judgment.

ACTION.

Ong Huck Lim for the plaintiff.

Triptipal Singh for the 1st and 2nd defendants.

Lee Thean-Chu for the 3rd and 4th defendants.

Cur. Adv. Vult.

Rigby J.: In this action the plaintiff claims:—

(1) a declaration that the lease dated the 27th June, 1958, in respect of the Bee Lean Cinema Theatre at Bedong, and made between the first two defendants as the lessors, of the one part, and himself and his then partner, of the other part, is valid and of full force for a further period of two years from the 1st day of July, 1960, to the 30th day of June, 1962;

(2) an injunction to restrain the defendants, their servants or agents, from interfering with his peaceful possession of the cinema theatre;

(3) an order for the return of certain specified parts of cinematographic apparatus, more particularly described in the Writ of Summons and the Statement of Claim, wrongfully removed by the 1st defendant from the cinema theatre on the 1st September, 1960;

(4) damages and any further or other relief.

The facts giving rise to the claim are briefly as follows. By an agreement dated the 27th June, 1958, the plaintiff and his then partner agreed to take a lease from the 1st and 2nd defendants (to whom I will hereafter refer as "the defendants" in contradistinction to "the 3rd and 4th defendants") of "the Bee Lean Cinema, together with its building equipments and projectors, telephones and electricity and other apparatus as per list" for a period of two years from the 1st day of July, 1958, at a monthly rental of $325. The agreement contained a clause providing that "at the end of two years' agreement period if the lessees think fit that they could carry out a further one or two years more than the lessors have the right to keep back the deposit till the termination of the period".

It further contained the usual clause that in the event of any dispute arising between the parties the matter should be submitted to arbitration.

Due to curfew restrictions and other unforeseen circumstances in connection with the Emergency, business was bad with the result that in December, 1959, the plaintiff's partner retired from the business leaving the plaintiff to carry on on his own. With the subsequent relaxation of the Emergency restrictions culminating in the termination of the Emergency itself, business improved. In May, 1960, the plaintiff, according to his evidence, gave verbal notice to the defendants of his intention to exercise his option of renewing the lease. The defendants deny that any such notice was given to them. I have no hesitation in accepting the evidence of the plaintiff, in preference to that of the defendants, that he did, in fact, give such notice. I am fortified in that view by the fact that on the 15th May, the defendants' solicitors wrote to